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No. 90-806

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CITY OF WILLCOX, ARIZONA,
ARIZONA ELECTRIC POWER COOPERATIVE, INC.,
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
ASSOCIATED GAS DISTRIBUTORS
and AMERICAN PUBLIC GAS ASSOCIATION,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

**REPLY BRIEF OF PETITIONERS TO BRIEFS
IN OPPOSITION TO PETITION FOR CERTIORARI AND
SUPPLEMENTAL BRIEF WITH SUGGESTION OF REMAND**

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v.

FEDERAL ENERGY REGULATORY COMMISSION,
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**REPLY BRIEF OF PETITIONERS TO BRIEFS
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Pursuant to Rules 15.6 and 15.7 of the Rules of the Supreme Court, petitioners hereby reply to the briefs of respondents in opposition to their petition for *certiorari* and hereby submit their supplemental brief. Petitioners also suggest that this Court issue an order remanding this case to the United States Court of Appeals for the District of Columbia Circuit to review the challenged orders in order to determine whether they comply with the criteria for generic abandonment under Section 7(b) of the Natural Gas Act (NGA), 7 U.S.C. §717f(b), established by this Court's decision in *Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Companies*, Nos. 89-1452 and 89-1453 (Jan. 8, 1991) (*Mobil*).

Petitioners concede that the issue, raised in their petition, of whether the Federal Energy Regulatory Commission (Commission) can ever order an abandonment under Section 7(b) of the NGA using generic rulemaking procedures is now moot. Petitioners further concede that the conflict between the decision below in the instant case and the Fifth Circuit's decision in *Mobil Oil Exploration & Producing Southeast, Inc. v. FERC*, 885 F.2d 209 (1990), no longer exists. But, the arguments by the Commission (Br. 4-5), the Interstate Natural Gas Association of America (Br. 4-8) (INGAA), and the Producer Respondents (Br. 3-4) (Producers) that the petition for *certiorari* ought therefore to be denied are irrelevant to the new issues raised by this Court's recent *Mobil* decision.

Prior to *Mobil*, this Court had never before held that the Commission is authorized to pregrant the abandonment of service through a generic rule rather than by means of individual case-by-case authorization.¹ In *Mobil*, this Court upheld the Commission's generic rulemaking authority to approve service abandonments under Section 7(b) of the Natural Gas Act by generic rule if, *inter alia*, it has established that there is a sufficient commonality of facts to make the statutory "finding" of "present or future public interest or necessity" by rulemaking rather than by adjudication. (Slip op. at 14). The Court of Appeals

¹ As this Court stated in *Mobil*, slip op. at 15, the Court's prior decision, *FPC v. Moss*, 424 U.S. 494 (1976), holds only that "... nothing in §7(b) prevents the Commission from giving advance approval of abandonment." That decision did not address the issue of generic abandonments, but involved a case in which the agency had acted by general rule to adopt "a *procedure* under which such pregranted abandonment may be authorized in *appropriate* cases." 424 U.S. at 501 (Emphasis added.)

did not address the issue of whether the Commission satisfied that statutory requirement. Petitioners request the remand of the instant case to the United States Court of Appeals for the District of Columbia Circuit so that that Court may review the orders of the Commission at issue here to determine whether they comply with the criteria for generic action established in *Mobil*.

**TO PROCEED BY GENERIC RULE, THE AGENCY MUST
FIRST DETERMINE THAT THE SUBJECT OF THE
RULE INVOLVES A COMMON, NOT CASE SPECIFIC,
SET OF FACTS.**

The Respondents (Commission, Br. 4-5; INGAA, Br. 4-7; Producers, Br. 2-4) argue that this Court's decision in *Mobil* controls the decision on the merits in the instant case.² In *Mobil*, however, this Court limited approval of generic abandonments by rulemaking to situations where "... the issues involved are general ..." and "... the questions under consideration

² The respondents suggest alternatively that various complaint-type procedures would provide the required "safety valve" to justify a generic rule. (INGAA, Br. 6-7; Producers, Br. 5-7). Whether the safety valve is adequate, however, is a relevant consideration only if the initial decision to proceed generically is itself valid. In any event, the Court of Appeals has already ruled that the alleged safety valve cannot salvage an unsupported rule. (App. 42a). Moreover, the safety valve must be an integral part of the rule. *FPC v. Texaco, Inc.*, 377 U.S. 33, 40 (1974); *Heckler v. Campbell*, 461 U.S. 458, 468 (1983). The fact that a complaint may be filed or the issue may be raised in a rate case or Gas Inventory Charge proceeding *after* the rule is applied to the detriment of the abandoned customers is clearly irrelevant. Each of these forms of relief is prospective only and under Section 7 once service has legally ceased, the Commission may lack the power to compel the pipeline to resume service.

are ‘not unique’ to the particular case.” (*Id.* at 15.) Producer abandonments, the Court held, fit that mold. In this case, by contrast, neither the Commission nor the Court of Appeals addressed whether the issues relevant to pipeline abandonments of service at the expiration of contracts are common to all customers for whom abandonment is sought or are unique to each pipeline and customer and to all customers of each pipeline.

In contrast to the Commission finding of commonality relied upon by this Court in *Mobil*—that the GFN regime would generally protect purchasers by allowing them to buy at market rates elsewhere in the event of abandonment (slip op. at 14)—the Commission’s transportation abandonment rule rested on a bare *presumption*, unsupported by any factual finding, that pipeline customers would not need the statute’s protection. “Presumably”, the Commission stated, every pipeline transportation customer has “the ability to provide itself with any amount of contract stability or protection it wishes.” (App. 220a). In remanding the pregranted abandonment rule to the Commission, the Court of Appeals correctly held that the Commission had failed to provide a reasoned explanation of “how pregranted abandonment trumps another basic precept of natural gas regulation—protection of gas customer from pipeline exercise of monopoly power through refusal of service at the end of a contract period.” (App. 42a). However, the Court of Appeals never addressed the threshold *jurisdictional* issue articulated in *Mobil*—whether the Commission had demonstrated or could demonstrate sufficient commonality of facts to justify a rule applicable to every customer of every pipeline. If the

Commission's rule does not meet this test, its action is not only arbitrary and capricious (as the Court of Appeals held), but it also violates Section 7(b) and must be reversed. This matter is of vital importance to consumers, and in the first instance must be addressed by the Commission after appropriate action on the requested remand by the Court of Appeals.

**THE REMAND BY THE COURT OF APPEALS DOES
NOT RENDER THE NEW QUESTIONS RAISED BY THIS
COURT'S MOBIL DECISION PREMATURE**

The Commission (Br. 5), the Producers (Br. 5) and INGAA (Br. 8-9) argue that review is premature because the challenged orders were remanded for reconsideration and findings on whether pregranted abandonment is warranted even though refusal of service at the end of the contract period places consumers at risk from pipeline exercise of monopoly power. The short answer to this claim is that the Court of Appeals remanded, but did not vacate the challenged rule, and that it remains in effect in the interim. This Court acted in *Mobil* five months after the Court of Appeals issued its remand order. Consequently, the Court of Appeals' order does not encompass the issue of whether the Commission action violates this Court's *Mobil* decision and thus requires outright reversal.³

³ The Commission contends (Br. 4) that petitioners did not sufficiently raise their statutory argument before the Court of Appeals because petitioners had conceded that Section 7(b) permits the Commission to authorize pregranted abandonment on a generic basis. While petitioners conceded that the Commission could adopt "procedures under which pregranted abandonment may be authorized in appropriate cases", citing, *FPC v. Moss*,

CONCLUSION

For the foregoing reasons, the Court should grant *certiorari* in the above-captioned case and remand it to the United States Court of Appeals for the District of Columbia Circuit for further consideration to determine whether its opinion complies with the criteria which this Court established in *Mobil* governing the issuance of a generic order authorizing the abandonment of service under Section 7(b) of the NGA.

Respectfully submitted,

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424 U.S. 494, 501 (1976), petitioners argued in their Brief in the Court of Appeals (p. 8) that the rule was defective because it did not include procedures to allow parties to present the facts necessary to determine whether Section 7(b) criteria have been met. Petitioners also clearly argued (pp. 9-10) that the Commission lacked the power to generically deregulate abandonments. However, even if petitioners had failed to properly raise the issue, respondents' argument is irrelevant. In *Mobil*, the Court held that the Commission does have the power to act generically under Section 7(b) and the only question remaining is whether the Commission acted in a manner which satisfied the standards of *Mobil*. This, as we note above, is an issue that should be decided in the first instance by the Court of Appeals.

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